



The Comptroller General
of the United States

Washington, D.C. 20548

De Trivite

Decision

Matter of: Microexpert Systems, Inc.

File: B-233892

Date: April 13, 1989

DIGEST

General Accounting Office review of agency selection of research proposals solicited pursuant to the Small Business Innovation Research Act is limited to determining whether agency violated any applicable regulations or solicitation provisions and whether the agency acted fraudulently or in bad faith.

DECISION

Microexpert Systems, Inc., protests the Army Research Institute's (ARI) failure to award it phase II funding for a project the firm proposed under the Department of Defense (DOD) Small Business Innovation Research (SBIR) program. Microexpert contends that its proposal to perform research for simulation-based intelligent tutoring systems for training intelligence analysts would have been funded if ARI had properly evaluated its proposal.

We deny the protest in part and dismiss it in part.

The SBIR program is conducted pursuant to the Small Business Innovation Development Act, 15 U.S.C. § 638 (1982), which requires certain federal agencies to reserve a portion of their research and development funds for award to small businesses. The program is made up of three phases. Under phase I, small businesses are invited to submit proposals to conduct research on one or more topics specified in the DOD annual SBIR program solicitation. Under phase II, firms that received phase I awards may, on their own initiative, submit proposals for further development work on the topic. Phase III, contemplates, that unlike phases I and II, that non-SBIR funds will be used to pursue commercial applications of the research or development.

The program solicitation identified the following criteria for determining the overall merit of phase II proposals: scientific/technical quality, qualifications of principal investigator and key personnel, anticipated benefits to

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total DOD research and development effort, degree to which phase I objectives were met, adequacy of phase II objectives to meet problem or opportunity, and cost to the government. Each factor was identified as being of equal weight, except that criterion one was twice the value of any other factor. Offerors were also informed that the agency was under no obligation to fund any proposals and that award would be contingent upon the availability of funds.

ARI received eight proposals for phase II funding in response to its notice to submit proposals. The technical evaluators found five of these proposals, including those of Microexpert and CHI Systems, Inc., to be technically excellent and substantially equal. All five proposals were recommended for funding to the ARI technical director, the authority for making the final recommendation decision for phase II funding.^{1/} The technical director states that the agency only had funds to support one contract and that he decided to recommend CHI's proposal for funding because CHI's proposal offered better program balance and the prospect of producing a product of more continuing interest to DOD. This protest followed.

Microexpert argues that ARI did not properly apply the criteria stated in the SBIR program solicitation in determining which of the five equal proposals should be recommended for funding. Specifically, Microexpert argues that ARI erred in stating that Microexpert's proposal did not discuss its phase III funding plans. Microexpert further contends that the agency's selection of CHI's proposal based upon "program balance" is improper because offerors were not informed that selection would be based upon this factor.

Since an agency has significant discretion to determine what proposals, if any, it will fund, see Small Business Administration (SBA) Policy Directive at 50 Fed. Reg. 920 (1985), our review in cases such as this is limited to determining whether the agency violated any applicable regulations or solicitation provisions and whether the agency acted fraudulently or in bad faith. Twentyfirst Century Technological Innovations Research and Development Enterprises, B-225179.2, Apr. 1, 1987, 87-1 CPD ¶ 368.

Microexpert does not contend that the agency acted in bad faith or fraudulently. Rather, the crux of its protest is

^{1/} ARI is not a contracting activity. Once ARI has selected a SBIR proposal for funding, it makes a recommendation to a contracting office.

that the agency failed to comply with the solicitation provisions in determining which of the five equal proposals should be recommended for funding. In this circumstance, the solicitation provides as follows:

"In the case of proposals [for Phase II funding] of approximately equal merit, the provision of a follow-on phase III funding commitment for continued development from non-Federal funding sources will be a special consideration. The follow-on funding commitment must provide that a specific amount of Phase III funds will be made available to or by the small business and indicate the dates the funds will be made available. . . . The funding commitment shall be submitted with the Phase II proposal."

Microexpert argues that if the agency had properly evaluated its plans for phase III funding, its proposal would have been chosen for funding. We do not agree. Microexpert did not show that it had provided for specific follow-on funding commitments from non-federal funding sources. Rather, Microexpert's proposal stated that several firms and a government program had "expressed interest in carrying the ideas forward when the ARI contract ends," but the proposal did not show that non-federal funds would be available at a specific time or in a specific amount for its phase III effort. Since Microexpert did not provide the commitment for phase III funding envisioned by the solicitation, the protester was not entitled to special consideration on this basis.

In this regard, none of the five equal proposals provided commitments for follow-on phase III funding with non-federal funds. The SBIR program solicitation provided generally that final decisions would be based on technical evaluations and "other factors, including a commitment for phase III follow-on funding, the possible duplication with other research [and] development, program balance, budget limitations and the potential of a successful phase II effort leading to a program of continuing interest to DOD." The agency used these other factors, and in particular "program balance," to determine which of the equal proposals it would choose to fund.^{2/}

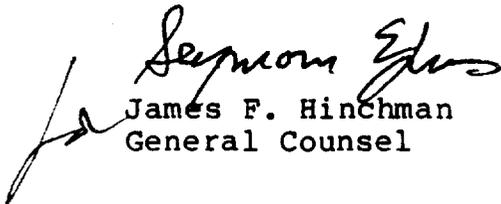
^{2/} "Program balance" according to ARI simply refers to its assessment of the relevance of the offeror's SBIR project to the needs of the Army.

Microexpert states that "program balance" was not included in the specific evaluation criteria identified to offerors but that "program balance" was only listed generally as an additional factor which could be considered in making the final funding decision. Microexpert argues that since offerors were not informed of the weight to be accorded "program balance" that it was improper for the Army to rely on this factor to distinguish between equal proposals.

We find no merit to Microexpert's arguments. Proposals were evaluated in accordance with the six listed evaluation criteria, and as a result of this evaluation, five proposals, including that of Microexpert, were found to be essentially equal. Since none of these equal proposals showed commitments for phase III funding, the agency looked to other factors, including "program balance", to determine which proposal would be recommended for funding. These other factors were identified in the solicitation as factors the agency might consider in its award decision. In this regard, the SBA policy directive states that program balance may be a secondary consideration in making an award decision. See 50 Fed. Reg. 920. Under the circumstances, we do not find that the Army violated any applicable regulations or solicitation provisions in choosing among the equal proposals. Since we have no basis on which to question the agency's decision to fund CHI's proposal, we deny Microexpert's protest on this ground.

Microexpert also contends that "program balance" is not defined by the solicitation and is ambiguous. Microexpert's protest of this alleged solicitation impropriety is untimely, since it was not filed prior to the closing date for receipt of phase II proposals. Our Bid Protest Regulations provide that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing date for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1) (1988). Consequently, this protest basis is dismissed.

We deny the protest in part and dismiss in part.


James F. Hinchman
General Counsel